



U.S. Department  
of Transportation  
Federal Aviation  
Administration

# Memorandum

Subject: INFORMATION: Service Contract  
Guidelines

Date: MAY 25 2005

From: FAA Acquisition Executive

Reply to  
Attn. of:

To: Distribution

I would like to take this opportunity to stress the importance of adhering to both policy and guidance related to service contracts in the Acquisition Management System (AMS). The AMS policy and guidance applies to all agency personnel with service contract-related responsibilities. I am providing the attached document that reiterates the direction contained in the AMS guidance to assist employees in understanding their responsibilities. Please ensure that all employees with contracting responsibilities receive a copy of this document.

Dennis DeGaetano

Distribution:

Russell G. Chew, ATO-1  
Sandra M. Sanchez, ATO-C  
James H. Washington, ATO-D  
Richard L. Day, ATO-E  
Eugene D. Juba, ATO-F  
Charles E. Keegan, ATO-P  
Michael A. Cirillo, ATO-R  
William S. Davis, ATO-S  
David B. Johnson, ATO-T  
Steven B. Zaidman, ATO-W  
ABA-1  
ACR-1  
AEP-1  
AGC-1  
AGI-1  
AHR-1  
AIO-1  
APA-1  
API-1  
ARC-1  
ASH-1  
ARP-1  
AST-1  
AVS-1

## **NOTICE TO CONTRACTING OFFICERS, CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVES, AND LINES OF BUSINESS**

### **Subject: Service Contract Guidelines**

It recently has come to my attention that FAA might not be uniformly administering its services contracts as required by the Acquisition Management System (AMS). Although every employee who is involved in an acquisition has responsibility for adhering to AMS policy, it is the particular responsibility of Contracting Officers to assure that the contracts they administer are in accordance with this policy. Accordingly, I hereby direct each Contracting Officer, working with their Contracting Officer Technical Representatives, legal counsel, and program offices, to review each of their service contracts to assure that they are being administered properly. Specifically, they should comply with the following:

1. Statements of Work and Independent Government Cost Estimates for task orders, work orders and other orders for services are prepared by the Government, and not by the contractor who will perform the work.
2. The Contracting Officer has issued a delegation memorandum to any assigned Contracting Officer's Technical Representative (COTR). The COTR is following the authority and responsibilities delineated in the delegation memorandum. The COTR has obtained and is maintaining a listing of employees who will be working on a Government site for service contracts. (Ref. AMS Procurement Toolbox T3.10.1.D). If the COTR or any other person exceeds his or her authority in ordering work from a contractor, an unauthorized procurement action must be processed if the Contracting Officer decides that this order should be ratified. (Ref. AMS Procurement Toolbox T3.1.4.A.3). The Contracting Officer must act promptly as soon as they learn of any such orders to either see that the steps necessary to ratify the unauthorized order are processed or direct the contractor to cease performance because that order has not been authorized.
3. Everyone involved in the contracting process is ensuring that actions resulting from oral directions are in accordance with the AMS and that all decisions are properly documented. The use of the contract file checklist is mandatory, and the documentation in the files is sufficient to constitute a complete history of the transaction.
4. Personal services are neither ordered nor provided unless the head of the relevant line of business determines that it is in the best interest of the Agency to acquire such services through a personal services contract. This determination is not delegable, it requires legal review prior to approval, and a copy of the approval must be sent to the Acquisition Executive. Although personal services contracts are permitted in the FAA, they should be used only when there is a clear demonstrated financial and program benefit to the FAA. Therefore this authority should be conservatively applied. There are a number of elements that must be

considered when making the determination to enter into a personal services contract. (Ref. AMS Procurement Toolbox T.3.8.2.A.)

- a. A personal service contract is a contract that, by its terms, **or as administered**, establishes what is tantamount to an employer-employee relationship between the FAA and the contractor's personnel. The most significant indicator of a personal services contract is when a Government employee supervises the work of one or more contractor employees.
  - i. Supervision includes directing or assigning work to specific contractor employees; directing that a contractor employee be hired, fired, promoted, rewarded, transferred or granted leave, or exercising control over how specific contractor employees perform their job. If an FAA employee provides what supervision the contract employee receives, the contract is for personal services.
  - ii. Other indicators include: the services are being provided on Government property; the Government supplies the equipment, furniture, computers or other supplies needed for the Contractor to perform their job; the work being performed by the Contractor is typical of the kind of work being performed by Government employees elsewhere in the agency; the work is expected to continue for more than one year; the work is an integral part of the agency mission. The presence (or absence) of one or even all of these factors in a particular contract does not necessarily determine whether a contract is being administered as a personal services contract. Instead the presence of these factors indicates that the contract must be particularly carefully scrutinized to assure that FAA employees are not supervising contractor employees, and thus creating a personal services contract.

(For example, secretarial services are usually personal services because the Government personnel for whom they are providing services usually provide work directly to the secretary, establish the secretary's priorities, and direct how the work is to be performed. A contractor providing phone answering or copying services not on Government property but offsite, using its own supplies, and the contractor determines which of its employees it will use to answer the phones or make copies, is not providing personal services.)

- b. Any determination to enter into a personal services contract must consider the following:
  - Federal and state income tax requirements;
  - Workmen's compensation, social security, unemployment compensation and related implications;

- The FAA's potential liability for services performed;
  - The availability of temporary hires to perform the desired services;
  - Demonstration of tangible benefits to the agency;
  - A detailed cost comparison demonstrating a financial advantage to the FAA from such contract;
  - Potential post employment restrictions applicable to former employees;
  - A legal determination that the work to be performed is not inherently governmental
5. The contractor is not providing any inherently Governmental functions. An inherently Governmental function is a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying government authority, or the use of value judgments in making decisions for the Government. (Ref: AMS Procurement Toolbox T3.8:2.A.2) Governmental functions normally fall into two categories: the act of governing, which requires the discretionary exercise of FAA authority, or decisions affecting monetary transactions and entitlements.
- Determining FAA program priorities and budget requests, conducting monetary transactions and/or entitlements, interpreting and executing laws that will bind FAA to take or not take some action by contract, policy, regulation, authorization or order; supervising FAA employees; representing the FAA at international meetings; and determining FAA policy are some examples of inherently Governmental functions.
  - Researching policy options, drafting opinions or regulations, preparing cost analyses, so long as Government personnel make the final decisions on the policy, opinion, regulation, use of the cost analysis, are examples of work that is not inherently Governmental. The Government personnel making the final decisions on a contractor drafted document, however, must not be simply "rubber stamping" the document, but exercising real independent and discretionary judgment in making decisions concerning the document and its uses.
6. The contract file reflects that the service organization is coordinating acquisition actions with FAA counsel on an ongoing basis throughout the acquisition lifecycle. Acquisition actions with an estimated total value greater than \$100,000, including support documents, were coordinated with the agency counsel. The Contracting Officer has documented the acquisition file with agency counsel's opinion and recommendations. The Contracting Officer has documented the reasoning/decision process when choosing not to follow the agency counsel's recommendations. (Ref. AMS Procurement Toolbox T1. 15.A 1 & 4, T1.15.A.1).

7. When acquiring services from a multiple award schedule or acquisition program, the procedures for competing task orders, or comparing rates and capabilities from multiple sources have been fairly and strictly followed. This applies to such programs as established by the GSA or from FAAs Programs such as BITS, RESULTS, or MASS/ESSA.

In addition, I ask that before services are acquired in the future, the entire service team (Contracting Officers, COTRs, attorneys, and program offices) make sure that there is a good business case for the services being acquired; that these services do not overlap or duplicate services being acquired elsewhere within the agency; that the Government has the expertise to appropriately monitor the contractor's performance; if there is more than one contract from which the services could be ordered, that the rationale for selecting the contractor chosen to perform the work is documented and that documentation includes a price or cost comparison.

Also, when Washington Headquarters' funds are to be used, the requiring office must use a Washington Headquarters' contract to make an obligation, unless authorization is received from the Office of Acquisition Policy and Contracting's appropriate contracts division manager.

Finally, by adhering to the existing policies in the AMS, FAA can better assure that it is getting the services it needs without incurring unnecessary liability or costs. At the same time it is just as important to ensure that our contracts are awarded and administered properly.



Vice President for Acquisition  
and Business Services

MAY 25 2005

DATE